STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

ILLINOIS BELL TELEPHONE COMPANY	)	**ICC Docket No. 00-0393**
Proposed Implementation of High Frequency Portion of Loop (HFPL)/Line Sharing Service.	)	

DATA NET SYSTEMS, LLC'S PETITION FOR CLARIFICATION OR IN THE ALTERNATIVE, REHEARING AND RECONSIDERATION OF THE COMMISSION'S MARCH 14, 2001 ORDER

Data Net Systems, LLC ("Data Net Systems") pursuant to Section 10-113 of the Illinois Public Utilities Act ("Act"), 220 ILCS 5/10-113, and 83 Ill. Adm. Code Section 200.880, petitions the Commission for clarification and/or rehearing and reconsideration of the Commission's March 14, 2001 Order (the "Order"). Data Net Systems states as follows in support of its Petition.

Data Net Systems requests that the Commission clarify or correct a statement in the Order that can only be construed as a misstatement by the Commission. At Page 52 of the Commission's Order, the Commission concludes:

> The Commission finds that Ameritech Illinois is not required to provide line splitting as proposed by AT&T. First, under the Eighth Circuit's decision in IUB I and IUB III, Ameritech Illinois cannot be required to provide new combinations of network elements. Although other state Commissions and Courts may have ordered ILECs to provide AT&T's requested form of line splitting, this does not affect our decision. Indeed, on December 5, 2000, the federal district court for the Western District of Michigan overturned a state commission's decision ordering Verizon North to offer new combinations of unbundled network elements at a CLEC' s request. *Verizon North, Inc. v. Strand*, File No. 5:98-CV (W.D. Mich. Dec. 5, 2000.) Relying on the Eighth Circuit's

> decision in IUB III, the Strand court held that any requirement that an ILEC combine UNEs for CLECs—even one imposed by a state commission—is preempted by the Act and predetermined by the Supreme Court in the IUB II decision. To the extent that other courts and Commission's have chosen to ignore the impact of the Hobbs Act designation of the 8th Circuit as the tribunal responsible for interpreting issues relating to TA96, we decline to follow their lead and, instead follow the rule of law.
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> Second, under the Line Splitting Order Ameritech has been required, and has agreed to provide access to the HFPL over the UNE-P when Ameritech Illinois is not the voice provider, when a requesting carrier provides the splitter, which is the extent of its obligation. Third Ameritech Illinois is not required to provide splitters under any circumstances and, therefore, cannot be required to provide them to CLECS utilizing the UNE-P. Fourth, the line splitting proposal would require us to order the unbundling of "splitters" as a new UNE, something the FCC has declined to do to date and for which we can find insufficient evidence to satisfy even the "impair" tests of FCC Rule 317 and Section 251(d)(2) of the Act.

Order, p. 52.

Significantly, the Commission must remember that this proceeding is a review and evaluation of whether a tariff filed by Ameritech under Illinois law is just and reasonable and whether it complies with the Illinois Public Utilities Act. This proceeding is not an arbitration proceeding brought under Sections 251 or 252 of the Federal Communications Act. Consequently, the Order's statement that "Ameritech Illinois cannot be required to provide new combinations of Network Elements" is plainly wrong. Furthermore, when the Commission summarily concludes, without reference to Illinois law, that "Ameritech Illinois is not required to provide splitters *under any circumstances and, therefore, cannot be required to provide them to CLECs utilizing the UNE-P,*" the Commission has acted contrary to the Illinois Public Utilities Act, and contrary to the Commission's prior orders. The Commission throws away its own independent authority to provide CLECs with unbundled network elements beyond that required

by the FCC upon a faulty and incomplete reliance on Ameritech's arguments regarding the applicability of *IUB I* and *IUB III*. [1]

These paragraphs of the Commission's Order are inconsistent with the Commission's own order in this docket, a reversal of the Commission's Orders in ICC Docket Nos. 98-0555 and 96-0486/96-0569, contrary to existing state law, and contrary to established federal law.

Data Net Systems respectfully requests that the Commission, at a minimum, reconsider or revise the Order to clarify that the Commission *does* indeed have authority to order incumbent local exchange carriers to provide new combinations of unbundled network elements, both as part of the UNE-platform and as part of any interconnection arrangement. Moreover, the Commission should clarify its Order to hold that the Federal Communications Act does not preempt the authority of the Illinois Commerce Commission to 1) require Ameritech to combine network elements for competitive carriers, 2) require Ameritech to provide new network combinations to competitive carriers, and 3) require Ameritech to provide new combinations of network elements under the UNE-platform to competitive carriers.

Data Net Systems further supports AT&T's Petition for Reconsideration of the substantive provisions of the Order that denied AT&T's request for line splitting arrangements.

INTRODUCTION

The Commission's Order generally provides a comprehensive and thoughtful analysis of Ameritech's obligations to make available the high frequency portion of loops for use in providing xDSL services. The Commission's Order, particularly with regard to the section

[1] *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997) ("*IUB I*"); *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) ("*IUB II*"); *Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000) ("*IUB III*").

ordering Ameritech to provide unbundled access to Project Pronto loops, shows the Commission's willingness and ability to proactively create market conditions that will promote competition in Illinois in a way that will benefit consumers of telecommunications services.

However, as the Commission recalls, Ameritech's line sharing tariffs were suspended only until March 18, 2001, and the Commission's Order was adopted just 2 business days before this deadline. In the haste of meeting the deadline, 2 paragraphs of the Order seemingly unravel over 7 years of telecommunications policy making by the Illinois Commerce Commission, and threatens to strangle the Commission's ability to promote competition in the future.

The Commission has correctly recognized that the FCC's *Line Splitting Order*[2] requires Ameritech to provide CLECs, including CLECs providing voice service via the UNE-platform, with the ability to engage in line splitting arrangements such that CLECs are able to offer both voice and data service over a single unbundled loop. *Id.* ¶ 19. The *Line Splitting Order* further orders ILECs to provide split lines when the customer is purchasing services from a carrier providing voice services on a UNE-platform loop. *Id.* ¶16. The FCC's order then concluded that it would not decided at the time of its order whether a splitter should be included in the definition of a "loop" so that a split line could be ordered by a CLEC as a network element. *Id.*, at ¶ 25.

The *Order*, at Ameritech's urging, has transformed the FCC's deferral of AT&T's proposed split line interconnection arrangement, to a complete deferral by the Commission to the FCC on all policies, under state or federal law, that affect telecommunication competition in Illinois. The *Order's* statement that the Illinois Commerce Commission has no authority to order Ameritech to provide new combinations that include line splitting arrangements is not only

[2] *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Services,* Third Report and Order on Reconsideration in CC Docket No. 98-147 and Fourth Report and Order on Reconsideration in CC Docket No. 96-98, FCC 01-26 (rel. January 19, 2001) (*"Line Splitting Order".)*

contrary to the Illinois Public Utilities Act, it is even contrary to the FCC's own *Line Splitting Order*. In its *Line Splitting* Order, the FCC encouraged state public service commissions to further develop the line splitting arrangements that would be available to promote competition:

> . . . we encourage state commissions to convene special collaboratives if incumbent LECs and competing carriers are unable to make progress on their own through existing collaboratives and change management fora.

Line Splitting Order, ¶21, n. 38.

The Illinois Commerce Commission has the legal authority to order Ameritech to provide CLECs with split lines on a UNE-platform basis both as a "new combination" of UNE's, as well as to prevent discrimination in the provision of network elements. The evidence in this proceeding is that Ameritech currently owns splitters, and uses line splitters in its network to provide voice and data services over its loops to its retail customers. *Order*, p. 46, Staff Exhibit No. 1.0 at 3-4. But regardless of how the Commission rules on the substantive decision of when to require Ameritech to provide splitters upon a CLEC's request, the Commission must not err in holding that it lacks authority to require Ameritech to provide splitters either as an interconnection arrangement, a new network element, as part of the loop functionality, or as a new combination of network elements.

In its comments below, Data Net Systems shows first that the Illinois Commerce Commission has the authority under state law to order any interconnection arrangement the Commission deems appropriate to promote competition in Illinois. Data Net Systems further shows that there is no binding federal authority that preempts this state authority, nor is there any binding federal authority that even suggests that new combinations of network elements that includes split lines is prohibited under the federal Act. The Commission must clarify its *Order* at page 52 accordingly.

I. THE MISSTATEMENT THAT THE ICC CANNOT ORDER AMERITECH TO PROVIDE NEW COMBINATIONS OF NETWORK ELEMENTS IN ITS TARIFF IS INCONSISTENT WITH THE COMMISSION'S ORDERS IN THIS PROCEEDING, ICC DOCKET NOS. 96-0486/96-0569 (TELRIC), AND 98-0555 (AMERITECH/SBC MERGER ORDER.)

The Commission's conclusion that it may not order Ameritech to provide new combinations of network elements that includes line splitters is fundamentally inconsistent with the Illinois Public Utilities Act, and internally inconsistent with the Commission's Order in this proceeding. The Illinois Commerce Commission in this proceeding is reviewing an Ameritech Illinois tariff filed with the ICC and suspended for investigation pursuant to Section 9-201 of the Illinois Public Utilities Act, 220 ILCS 5/9-201. (*Suspension Order*, p. 2.) Notably, this is not an arbitration proceeding under Section 252 of the Federal Communications Act. Consequently, the Commission's review of Ameritech's tariff is governed by Illinois law.

A. The Illinois Public Utilities Act Authorizes the Commission to Order Any Interconnection Arrangement, Including New Combinations, that the Commission Deems in the Public Interest.

As the *Order* itself notes, the Illinois PUA "mandates that 'all rates or other charges made, demanded or received . . . for any service rendered or to be rendered shall be just and reasonable,' and that 'all rules and regulations made by a public utility affecting or pertaining to its charges to the public shall be just and reasonable.'" *Order*, p. 3, *quoting* 220 ILCS 5/9-101. The Illinois Act further provides, and the *Order* recognizes, that if the Commission determines that a proposed tariff is not just and reasonable, "the Commission may order rates, terms and conditions that are just and reasonable." *Id.* More specifically,

> the Commission shall determine the just, reasonable, or sufficient rates or other charges, *classifications, rules, regulations, contracts or practices to be thereafter observed and in force, and shall fix the same by order* . . . .

Order, p. 3, *quoting* 220 ILCS 5/9-201 [emphasis added.]

Section 13-505.5 of the Public Utilities Act further provides that

> Any party may petition the Commission to request the provision of a noncompetitive service not currently provided by a local exchange carrier within its service territory. The Commission *shall grant the petition, provided that it can be demonstrated that the provisioning of the requested service is technically and economically practicable* considering demand for the service, and absent a finding that provision of the service is otherwise contrary to the public interest.

220 ILCS 5/13-505.5 [emphasis added.] Section 13-505.5 of the PUA would allow AT&T, or any other party, to petition the Commission for line splitting arrangements, as a noncompetitive service, and the Commission would be authorized (and perhaps required) to require Ameritech to tariff and provide those services upon a Commission finding that the service is "technically and economically practicable."

Section 13-505.6 also provides the Commission independent authorization to order Ameritech to provide AT&T's recommended line splitting arrangements as a new network element or as part of the loop facility under Illinois law.[3] Section 13-505.6 provides:

> Unbundling of noncompetitive services. A telecommunications carrier that provides both noncompetitive and competitive telecommunications services shall provide all noncompetitive telecommunications services on an unbundled basis to the same extent the Federal Communications Commission requires that carrier to unbundle the same services provided under its jurisdiction. *The Illinois Commerce Commission may require additional unbundling of noncompetitive telecommunications services over which it has jurisdiction based on a determination, after notice and hearing, that additional unbundling is in the public interest and is consistent with the policy goals and other provisions of this Act.*

[3] Data Net Systems recognizes that AT&T requests split lines as part of the loop functionality. Data Net Systems does not dispute AT&T's characterization of how line splitters should be provided by Ameritech (i.e. as a part of the loop or as a network element.) Data Net Systems takes issue with the *Order's* conclusions at p. 52, that Ameritech "cannot be required to provide new combinations of network elements."

220 ILCS 5/13-505.6 [emphasis added.] Again, the Commission has been authorized, even mandated, by the Illinois legislature to require "additional unbundling of noncompetitive telecommunications services" if it finds that such new network elements are in the public interest and consistent with the policy goals of the PUA.

Data Net Systems agrees, as discussed below, that the Federal Communications Commission has not yet specifically imposed an affirmative duty on Ameritech to provide line splitters as a new combination of network elements, or as part of the interconnection arrangements available to CLECs. However, neither the FCC's *Line Splitting Order* nor the *Iowa Utilities Board* decisions preempt Sections 9-201, 13-505.5 or 13-505.6 of the Illinois Public Utilities Act, and cannot be read to prevent the Illinois Commerce Commission from ordering new combinations of network elements if the Commissions finds that such combinations are in the public interest.

B. The Commission Has Already Held, in the Ameritech/SBC Merger Order, that the Commission May Order New Combinations of Network Elements.

The ICC has on at least 2 prior occasions exercised its authority under the Illinois PUA to order Ameritech to combine network elements for CLECs after concluding that such combinations would promote competition. In the Ameritech/SBC merger proceeding,[4] the Commission considered whether it should, and under what conditions, permit Ameritech and SBC to merge. At the time of the Merger Order, Ameritech was asserting that the FCC could not order Ameritech to provide shared transport to CLECs because it was a "combination" of network elements prohibited by the *IUB I* decision. Ameritech argued that because the Federal

[4] *SBC Communications et al., Joint Application for Approval of the Reorganization of Illinois Bell Telephone Company in Accordance with Section 7-204 of the Public Utilities Act,* ICC Docket No. 98-0555, Order, September 23, 1999 ("*Ameritech/SBC Merger Order.*").

Communications Act did not impose a duty on ILECs to combine network elements for CLECs, Ameritech could not be compelled to provide shared transport. Ameritech's claim then is quite similar to its claim today that the Commission has no authority to order split lines as part of interconnection arrangement made available to CLECs.

The Commission concluded that Ameritech, which was then in violation of the Commission's shared transport orders entered ICC Docket No. 96-0496, would be required, as a precondition of the ICC's approval under Illinois law of the proposed merger, to provide common transport as a combination of network elements:

> Furthermore, within one year of the merger closing, the Joint Applicants are ordered to implement and offer in Illinois the same version of shared transport that has been implemented by SBC in Texas utilizing AIN facilities. Finally, the Joint Applicants are ordered to continue reviewing the issue of offering shared transport and report to Staff as soon as any change in facts occur on a semi-annual basis.
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> *We find that this condition to provide Shared Transport should continue even if the FCC eventually decides that unbundling Shared Transport is not proper in its UNE Remand docket. Section 7-204(f) gives this Commission the power to impose terms, conditions or requirements on this merger which protect the interests of Ameritech Illinois' customers.* The Commission determines, in its judgment, that it is in the best interests of those customers to have access to an open local exchange market in Illinois. Shared transport is crucial in developing this open market. The offering of shared transport by Ameritech Illinois to its competitors obviates the need for CLECs in Illinois to build or purchase dedicated interoffice transport facilities which are duplicative of existing Ameritech Illinois facilities. Since building or purchasing existing facilities is prohibitively expensive, the Commission deems the offering of shared transport as lowering the barriers to entry for CLECs in the Illinois local exchange market and thereby improving the environment for competitive entry. *Any condition which leads to a more open local exchange market and real telecommunication service options for customers, as this condition does, serves the interests of the customers. Thus, we find that we do have the authority to impose this condition.*
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> *In the event that the FCC reverses its previous position and decides in its remand docket that shared transport should not be unbundled, the Joint Applicant's are directed to file with this Commission within 30 days of the*

> *FCC decision a petition seeking an Illinois-specific determination of the propriety of unbundling Shared Transport under Section 13-505.6.* 220 ILCS 5/13-505.6.

Ameritech/SBC Merger Order, p. 184 [emphasis added.] The Commission, in 1999, held that is has authority under Illinois law to require Ameritech to combine network elements for CLECs, irrespective of whether the FCC would impose the same requirement under the federal Act.

The Commission should be reminded that the Ameritech/SBC Merger Order was issued after the first Eighth Circuit decision in *Iowa Utilities Board* (*IUB I*) and after the *AT&T* Supreme Court decision affirming in part and reversing in part the Eighth Circuit's decision (*IUB II*). So the Commission, and Ameritech and SBC, were well aware at that time that the federal Act had been construed to not impose an affirmative duty on ILECs to combine network elements for CLECs. The Commission's Merger Order rejected Ameritech's arguments that the Commission lacked authority to order combinations, held that it did have authority under state law to order new combinations, and confirms that the Illinois Public Utilities Act has not been preempted by the Federal Communications Act.

C. The Commission Concluded in its Original TELRIC Order That the Federal Communications Act Does Not Preempt the Commission's Authority.

In 1995, WorldCom petitioned the Commission pursuant to Section 13-505.5 of the Illinois Public Utilities Act to order Ameritech to provide a platform of network elements underlying Ameritech's retail services. *AT&T Communications of Illinois, Inc. Petition For A Total Local Exchange Wholesale Tariff/LDDS Communications, Inc. d/b/a LDDS Metromedia Communications Petition for a Total Wholesale Network Service Tariff,* ICC Docket Nos. 95-0458/0531, (Consol.), *Order,* June 26, 1996 ("*Wholesale/Platform Order*".) The petition requested that the Commission order an ILEC to provide the UNE-platform to a requesting

carrier. WorldCom's request for the UNE-platform was complimentary to the Commission's previous orders requiring Ameritech to provide unbundled loops and local call termination.

Under the *Wholesale/Platform Order*, the Commission ordered Ameritech to provide the UNE-platform of network elements, either combined or individually, underlying all of the existing Ameritech retail services. The Complaint was brought prior to the adoption of the Telecommunications Act of 1996, but the Commission's Order was issued after that amendment. The Commission held that subsection 251(c)(3) of the Federal Act required incumbent LECs to make their network elements available to requesting carriers, including combining the network elements to provide end-to-end services without any requirement to connect these network elements to the requesting carrier's own facilities. *Wholesale/Platform Order* at 64. However, the Commission's decision was not dependent on the FCC's determination of the application and requirements of subsection 251(c)(3) of the Federal Act. The Commission explicitly held that the UNE-platform was required under section 13-505.5 of the Illinois Act.

> No party contests that the service being requesting ("sic") is a non-competitive service, not currently being provided by the responding LECs. The (Local Switching Platform) is already part of the network architecture and, therefore, technically feasible. Therefore, we find that the record establishes that (Worldcom) has satisfied the requirements of section 13-505.5, regardless of whether granting (Worldcom's) petition, as modified by Staff, may also be granted pursuant to section 13-505.6. For the reasons stated, we find it to be in the public interest that the (Worldcom) petition be granted.

Wholesale/Platform Order at 64.

The Commission further specifically rejected requests to defer its decision until the FCC determined whether granting the WorldCom petition was required pursuant to the Federal Act. The Commission again held that the requested service was required under Illinois law.

> The Commission also rejects the requests of MFS, TC Systems, and Ameritech that we defer any action until after the FCC has resolved its

> rulemaking proceedings. (Worldcom) brought its petition pursuant to the PUA and has a legal right to a determination.

Wholesale/Platform Order at 66.

After the *Wholesale/Platform Order*, the FCC issued its *First Report and Order*.[5] The FCC held that the Federal Act authorized the FCC to require incumbent LECs to provide network elements that could be combined to provide end-to-end exchange and exchange access services. *First Report and Order* ¶ 331. This order was consistent with the Illinois Commerce Commission's *Wholesale/Platform Order*. The FCC also found that it could require incumbent LECs to combine network elements, or provide existing network element combinations, at the request of the purchasing carriers. *First Report and Order* at ¶¶ 293-296. On appeal, the 8th Circuit affirmed the FCC's determination that requesting carriers may purchase all of the network elements of an incumbent LEC which are necessary to provide end-to-end exchange and exchange access services. *Iowa Utilities Board v. Federal Communications Commission,* 120 F.3d 753 (8TH Cir. 1997.) However, the 8th Circuit held that subsection 251(c)(3) did not impose a duty on incumbent LECs to combine network elements for the purchasing carrier. Since the federal Act did not impose that obligation on incumbent LECs, the 8th Circuit held that the FCC was not authorized to impose any such obligation in its federal rules (47 C.F.R. 51.315(b) – (f)). *IUB I,* 120 F.3d at 813.

After the Eighth Circuit's *IUB I* decision, the Commission initiated CC Docket Nos. 96-0486/96-0596, *Investigation into forward looking cost studies and rates of Ameritech Illinois for*

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[5] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* FCC CC Docket Nos. 96-98/95-185, *First Report and Order,* Released August 8, 1996 (*"First Report and Order"*); *Order on Reconsideration,* Released September 27, 1996 (*"Order on Reconsideration"*); *Second Order on Reconsideration,* Released, 1996, *further recon. pending, aff'd in part and vacated in part sub. nom. CompTel v. FCC,* 11 F.3d 1068 (8th Cir. 1997), *aff'd in part and vacated in part sub.nom. Iowa Utilities Bd. v. FCC,* 120 F.3d 753; *Third Order on Reconsideration*, Released August 18, 1997 *("Third Order on Reconsideration").*

interconnection, network elements, transport and termination of traffic Proposed rates, terms and conditions for unbundled network components, Second Interim Order, February 17, 1998, 1998 Ill. PUC LEXIS 109 ("*96-0486 Order*"). There again, the Commission addressed whether the Illinois Commerce Commission has the authority to provide CLEC's interconnection and access obligations under Illinois law that went beyond those interconnection arrangements imposed on LECs under federal law.

The Commission, after extensive briefing and oral argument on whether *IUB I* preempted state law, implemented prices for network elements based on existing state law, concluding that the *IUB I* decision vacating the FCC's pricing rules did not preempt the ICC's authority to fix the terms and conditions of interconnection. *96-0486 Order*, 1998 LEXIS at *11.

This Commission has a history of concluding that the Federal Communications Act does not preclude the Commission from adopting interconnection arrangements, like AT&T's split line request, beyond those then authorized by the FCC. The federal Act imposes obligations and duties on incumbent LECs; it does not impose limitations on state commissions.

II. THE *IOWA UTILITIES BOARD* DECISIONS DO NOT PREEMPT STATE AUTHORITY TO IMPOSE INTERCONNECTION ARRANGMENTS UNDERS STATE LAW THAT GO BEYOND THOSE ORDERED BY THE FCC.

Even assuming that the Commission is inclined to change its prior orders to hold that it lacks authority under Illinois law to adopt terms of interconnection (including new UNE combinations) that would promote competition, the Commission is not compelled to do so under the *IUB* cases, or any other federal law or decision. There is no federal law that limits a state right to adopt interconnection terms and conditions that are intended to promote competition.[6]

[6] To be clear, state laws that *impede* competition are preempted. *IUB II,* 526 U.S. at 366. But there is no question that AT&T's proposed line splitting arrangement, if adopted by the Commission, would not impede competition.

It is clear that the Commission has the authority to require Ameritech to combine UNEs and to provide for additional terms of interconnection beyond what the FCC or the Federal Communications Act has mandated as the minimum standards. Ameritech's position on providing network elements is that the federal Act, as interpreted by the Eighth Circuit in *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997) (subsequent history omitted) ("*IUB I*") and *Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000) ("*IUB III*") precludes state commissions from providing CLECs with combined network elements that are not ordinarily combined in Ameritech's network. However, the fact that certain FCC rules requiring ILECs to combine network elements (specifically 47 C.F.R. 51.315(c) - (f)) were vacated by *IUB I* and *IUB III*, does not limit a state's ability to order ILECs to combine network elements.

Section 251(c)(3) provides as follows:

> (c) Additional Obligations of Incumbent Local Exchange Carriers.--In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:
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> (3) Unbundled access.--The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory *in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.*

47 U.S.C. § 251(c)(3).

As discussed below, neither the Federal Communications Act, nor federal caselaw construing the Act, preempts state authority to adopt terms of interconnection that would promote competition.

A. The Federal Communications Act Does Not Preempt State Regulation of Interconnection Arrangements.

Federal preemption of state authority is never presumed. The United States Supreme Court has stated that it is reluctant to infer preemption of state laws by the Federal government. In its previous interpretation of the Federal Communications Act of 1934, the U. S. Supreme Court identified the specific circumstances where it would find that a federal act preempts state authority in the same area.

> The Supremacy Clause of Art. VI of the Constitution provides Congress with the power to preempt state law. Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, *Jones v. Rath Packing Co.*, 430 U.S. 519, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977), when there is outright or actual conflict between federal and state law, e.g. *Free v. Bland,* 369 U.S. 663, 82 S.Ct. 1089, 8 L.Ed.2d 180 (1962), where compliance with both federal and state law is in effect physically impossible, *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963), where there is implicit in federal law a barrier to state regulation, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983), where Congress has legislative comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947), or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. *Hines v. Davidowitz,* 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941).

Louisiana Public Service Commission v. Federal Communications Commission, 476 U.S. 355, 368-369, 106 S. Ct. 1890, 1898, 90 L.Ed.2d 369 (1986). When the U.S. Supreme Court vacated certain FCC regulations adopted under the § 251 and § 252 of the federal Act, the U.S. Supreme Court held that its decision in *Louisiana Public Service Commission* remained intact. *IUB II*, 525 U.S. at 731, n. 2.

None of the examples referred to by the *Louisiana Public Service Commission* decision that test whether federal law has preempted state law are present in either the federal Act, or in the *IUB* decisions. The Federal Act does not expressly state that state telecommunications laws

are preempted under federal law. In fact, the statutory language recognizes continued state regulation. *See e.g.* 47 U.S.C. § 261. Congress has not sought through the Federal Act to legislate comprehensively, thus occupying the entire field of regulation and leaving no room for the states to supplement federal law. And, the federal scheme clearly identifies a dual role for both federal and state regulation and this was recognized by the *IUB* decisions:

> § 251(d)(3). Preservation of State Access Regulations. – In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that –
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> (A) establishes access and interconnection obligations of local exchange carriers;
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> (B) is consistent with requirements of this section; and
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> (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

47 U.S.C. § 251(d)(3). In fact, the federal Act expressly indicates the Congressional intent to preserve for the states the authority to prescribe and enforce additional requirements. 47 U.S.C. § 261(c) ("Nothing . . . precludes a state from imposing requirements . . . that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.")

Where both federal regulation and state regulations coexist, state regulations are preempted where it is physically impossible to comply with both federal and state regulations. *See e.g. Florida Lime & Avocado Growers, Inc.*, 373 U.S. at 142-143, 83 S. Ct. at 1217. In *Florida Lime & Avocado Growers*, the Supreme Court exemplified what constitutes a physical impossibility. The Supreme Court hypothesized a case where federal regulations forbade the picking and marketing of any avocado testing *more than 7%* oil content while state regulations

forbade the marketing of any avocado testing *less than 8%* oil content. Dual compliance with both federal and state regulations would be impossible. *Florida Lime & Avocado Growers, Inc.*, 373 U.S. at 142-143, 83 S. Ct. at 1217-1218. Where it is actually impossible to comply with both the state and federal laws, the state law is preempted under the Supremacy Clause.

In this case, it is possible for the Commission to order Ameritech to provide split lines under AT&T's proposal without conflicting with the federal Act. Ameritech may not prefer to provide split lines as an interconnection arrangement in Illinois, but that does not make it impossible. The *IUB III* Court of Appeals held that there was no federal obligation for incumbent LECs to combine the network elements for the requesting carriers. However, incumbent LECs are not *prohibited* under the federal Act from providing combined network elements to requesting carriers.

Congress has not expressly preempted the states under the terms of the statute, Congress has not so occupied the entire field that there is no room left for the states to regulate, nor has Congress established one uniform system to which the states cannot complement or add. State authority to adopt terms of interconnection that go beyond that authorized by the FCC is not preempted.

B. Courts Construing the Federal Communications Act Have Not Held that State Authority is Preempted by the Federal Communications Act.

Courts have recognized that states may provide CLECs with terms of interconnection (including network elements, combinations of network elements, and combinations of network elements involving the UNE-platform.) For example, the Ninth Circuit upheld an interconnection agreement requiring US WEST to provide combinations of network elements even though the Eighth Circuit had struck down the FCC's rules upon which the state

commission had relied in adopting the agreement. *MCI Telecommunications Corp. v. US WEST Communications*, 204 F.3d 1262, 1268 (9th Cir. 2000), *cert denied US West Communications, Inc. v. MFS Intelenet, Inc.*, 120 S.Ct. 2741 (2000.) In so holding, the Court observed:

> The Eighth Circuit's decision to vacate the FCC regulation certainly still stands, and is immune under the Hobbs Act from collateral attack. *See* 28 U.S.C. § 2342; *US WEST Communications v. MFS Intelenet*, 193 F.3d 1112, 1120 (9th Cir. 1999). All this means for the purposes of the present appeal is that the Act does not currently mandate a provision requiring combination. Our task is to determine whether such a provision "meets the requirements" of the Act, *i.e.*, to decide whether a provision requiring combination violates the Act.

Id. The court further held that *the state commission could mandate combinations under the Act. Id.*

Similarly, in *US WEST Communications, Inc. v. Hix*, Civ. Action No. 97-D-152, slip op. (D. Co. June 26, 2000), the court held that the fact that the Eighth Circuit had vacated certain FCC rules "does not compel the conclusion that" interconnection agreements adopted by the Colorado Public Service Commission incorporating those rules "are prohibited by the Act." *Id.* at 14. "Instead, the Court must question whether the interconnection agreements . . . are consistent with the Act, independent of [the FCC's rules]." *Id.*

In addition, the U. S. Court of Appeals for the Fifth Circuit has held that state commissions are not precluded by the Act from requiring ILECs to provide combinations of elements not ordinarily combined in the ILECs' networks. *Southwestern Bell Telephone Company v. Waller Creek Communications, Inc.*, 2000 WL 1091669 (Aug. 21, 2000 5th Cir.).

Each of these federal court decisions was issued *after* the FCC rules that had required ILECs to combine separate elements not ordinarily combined in the ILEC's network were vacated by the Eighth Circuit. The *Waller Creek* decision was issued after the Eighth Circuit's

IUB III decision. The *Waller Creek* Court made clear that the Eighth Circuit decision had no bearing on the authority of state commission's to order ILECs to combine network elements not currently combined in ILEC networks. In rejecting the notion that such a requirement would somehow violate the Act, the *Waller Creek* Court held:

> Further there is nothing "illegal" about the provision requiring SWBT to combine network elements for Waller or any other CLEC. Nothing in the Telecommunications Act forbids such combinations. Even if the Eighth Circuit's decision on this issue is correct - - which we do not decide today - - it does not hold that such arrangements are prohibited; rather, it only holds that they are not required by law.

Waller Creek, 2000 WL 1091669, at *7.

The *IUB I* and *IUB III* decisions vacating 47 C.F.R. 51.315(c) – (f) do not preclude the Illinois Commerce Commission from providing reasonable combinations of network elements through its own authority, or under the federal Act, so long as those combinations do not impede competition.

Further support for this proposition is embedded in the *IUB* decisions rescinding 47 C.F.R. 51.317 and 51.319. Rules 317 and 319 adopted by the FCC required the ILECs to provide CLECs with access to a minimum of 7 network elements, so long as access was "necessary" and failure to provide access would "impair" the competitors' ability to provide services. The Supreme Court vacated *47 C.F.R. § 51.319* because the FCC's interpretation of the "necessary" and "impair" standard was too broad and unreasonable. *IUB II,* 525 U.S. at 388-92. Thereafter, the Eight Circuit vacated 47 C.F.R. § 51.317 in light of the Supreme Court's decision. *IUB III*, 219 F.3d at 744.

The *IUB* orders did indeed rescind these rules and remanded the issue back to the FCC. However, the rescission of these FCC rules did not in any way limit state's authority to regulate in the area of the terms and conditions of interconnection. To the contrary, Rules 317 and 319

were limitation on state's rights in reviewing the term and conditions of interconnection agreements among LECs. Even when the rules were in place, states had authority to implement greater terms and conditions for interconnection. But, the rescission of those rules makes clear that there are less federal standards that limit state rights even for interconnection agreement under Section 251 and 252 of the FCA.

The *Order's* claim that the *Verizon North v. Strand* decision preempts state law to order combinations of network elements that the ICC deems necessary to promote competition is similarly mistaken. In *Verizon v. Strand*, Verizon filed a Complaint in federal court challenging the Michigan Public Service Commission's Order in Case No. U-11281 that Verizon (then GTE) file a tariff with the MPSC as part of Verizon's compliance with the Federal Communications Act. The Commission's order in U-11281 ordering Verizon to file a tariff was construed by Verizon and the court to be a complete substitute for the negotiated interconnection agreements under the Federal Communications Act. The *Strand* court held that state commission's could not dispose completely of the negotiated interconnection process by requiring a state tariff filed under the Federal Communications Act. *Strand*, at p. 11.

The *Strand* decision is inapplicable where, as here, the tariff at issue is 1) separate and distinct from the negotiated interconnection process under the Federal Communications Act[7] and 2) evaluated under Illinois law, not just the Federal Communication Act and FCC decisions. Even the *Strand* Court held that states are not preempted in adopting *additional* interconnection terms and conditions under state law that are necessary to promote competition:

> State Commissions can impose their own rules "in fulfilling the requirements of this part, if such regulations are not inconsistent with the

[7] Data Net Systems notes that just prior to the ICC's adopt ion of the *Order*, the Commission entered an Order in the Rhythms/Covad Interconnection proceeding, CC Docket Nos. 00-0312/0313, further evidence that the Commission's investigation and orders in the instant proceeding are not a substitute for the arbitration proceedings under the FCA.

> provision of the [FTA]." 47 U.S.C. § 261. State commissions can also impose additional requirements "that are necessary to further competition in the provisions of telephone exchange service or exchange access, so long as the State's requirements are not inconsistent with" the FTA or the FCC's regulations to implement the FTA. 47 U.S.C. § 261(b) & (c). The FTA provides that prescribing and enforcing regulations to implement the FTA, the FCC shall not preclude enforcement of any regulation, order, or policy of a State commission establishing access and interconnection obligations so long as the regulation, order or policy is consistent with the requirements of § 251, and does not substantially prevent implementation of the requirements and purposes of the FTA. 47 U.S.C. § 253(d)(3).

Strand, a p. 6-7.

As the Commission is well aware, Judge Bell in the *Strand* case also considered whether the MPSC's Order in U-11281 could compel Verizon to provide CLECs with access to new combinations of network elements. Judge Bell concluded, relying upon *IUB III*, that Section 253(c)(3) of the federal Act does not impose an affirmative "duty" on ILECs to combine network elements that are not ordinarily combined in their network. *Strand* at 12. Judge Bell then jumped to the erroneous conclusion that because (under *IUB III*) Section 253(c)(3) does not impose an affirmative duty on the ILECs to actively combine new combinations, that the federal Act specifically precludes states from adopting new combinations. *Id.* Judge Bell also indicated his disagreement with the Fifth Circuit *Waller Creek* decision, which held that while the FTA does not impose a duty on ILECs to combine new network elements, states may provide for such combinations. *Id* at 13.

While Judge Bell may disagree with the Fifth Circuit court of appeals panel in *Waller Creek*, his conclusion is not even consistent with the *IUB III* order. A federal court reviewing a state commission decision does not determine whether the 1996 Act *requires* the result that the state commission reached, but rather whether the state commission's action in promoting competition is prohibited by the 1996 Act. *See, e.g., Waller Creek*, 221 F.3d at 821; *MCI v. U.S.*

West, 204 F.3d at 1268; *U S West v. MFS Intelenet*, 193 F.3d at 1121. Applying that scope of review, in *MCI v. U.S. West* the Ninth Circuit considered whether the state commission violated the Act by requiring the incumbent to provide access to new combinations, and concluded that it did not:

> Our task is to determine whether such a provision 'meets the requirements' of the Act, i.e., to decide whether a provision requiring combination violates the Act. The Supreme Court's interpretation of the Act makes absolutely clear that it does not.

MCI, 204 F.3d at 1268. Thus, while the 1996 Act may not *require* incumbent carriers to provide access to new combinations of network elements, nothing in the Act *prohibits* state commissions from ordering incumbents to provide access to new combinations.

Judge Bell's opinion is not even consistent with the Supreme Court's decision. Even the Supreme Court recognizes that the FCC has not fully preempted state action with respect to those network elements that states can provide for CLECs:

> Congress has broadly extended its law into the field of intrastate telecommunications, but in a few specified areas (ratemaking, interconnection agreements, etc.) has left the policy implications of that extension to be determined by state commissions, which -- within the broad range of lawful policymaking left open to administrative agencies -- are beyond federal control. Such a scheme is decidedly novel, and the attendant legal questions, such as whether federal courts must defer to state agency interpretations of federal law, are novel as well.

IUB II, 525 U.S. 385, n. 10. State laws that impede competition have been preempted, but state laws that promote competition survive, and state public service commission authority to adopt terms and conditions for access to a LEC's network elements can go beyond those terms and conditions promulgated by the FCC.

C. The Hobbs Act Does Not Preempt State Authority to Regulate the Terms and Conditions of Interconnection Arrangements.

The Commission's Order against line splitting relies on the Hobbs Act, 28 U.S.C. § 2342, as a basis that the Commission lacks authority to provide network elements to competitive LECs in Illinois. The Hobbs Act is merely a Federal Rule of Civil Procedure that vests federal courts of appeal, rather than federal district courts, with jurisdiction to review decisions of the Federal Communications Commission. 28 U.S.C. § 2342(a). The Hobbs Act also specifies that federal courts of appeal have jurisdiction over final orders of the Secretaries of Agriculture, Transportation, Federal Maritime Commission, and many other federal acts. The point is that the "Hobbs Act" does not provide the Eight Circuit with the exclusive authority to interpret the Federal Communications Act. Consequently, the Commission should not, cannot, ignore cases like *Waller Creek* which clearly hold that the ICC is not precluded from adopting new combinations that do not impede competition.

The *Order's* reliance on the Hobbs Act is taken from Ameritech's argument that only the Eighth Circuit Court of Appeals has jurisdiction to review "all petitions for review of FCC orders interpreting/implementing the Act in a single court of appeals." *Order*, p. 31, citing *Southwestern Bell Tel. Co. v Arkansas Public Service Com. (1984, ED Ark) 584 F Supp 1087, rev'd on other grounds, 738 F2d 901, vacated without op 476 US 1167, 90 L Ed 2d 973, 106 S Ct 2885.* Ameritech's claim that the Eighth Circuit is the preeminent authority on "all" FCC orders is preposterous, and the Southwestern Bell Telephone case in no way stands for that proposition.

What is true is that the Eighth Circuit is the current court of appeals that, through multidistrict litigation rules, is the federal court of appeals that retains jurisdiction to address the validity of *FCC regulations* adopted under Section 251 and 252 of the Act.

> The FCC promulgated its initial regulations under the Act in 1996. Under the Hobbs Act, the Federal Courts of Appeals have exclusive jurisdiction over challenges to FCC regulations. *See 28 U.S.C. § 2342; 47 U.S.C. § 402*(a). Several parties filed petitions for review of the FCC regulations in several different circuits. When agency regulations are challenged in more than one court of appeals, *28 U.S.C. § 2112* requires that the panel on multidistrict litigation consolidate the petitions and assign them to a single circuit. The panel assigned the challenges to the FCC regulations to the Eighth Circuit, which thereby became, and remains, "the sole forum for addressing ... the validity of the FCC's rules." *GTE South, 1999 WL 1186252,* at *8

MCI Telecommunications v. US West, 204 F.3d 1262, 1267 (9th Cir. 1999.) As noted above, after the court recognized the impact of the Eighth Circuit decisions invalidating the FCC regulations requiring that ILECs combine elements for CLECs, the court held that, while the federal Act did not require combinations, state commissions (here Washington) could require combinations without violating the Act:

> The Eighth Circuit's decision to vacate the FCC regulation certainly still stands, and is immune under the Hobbs Act from collateral attack. *See 28 U.S.C. § 2342; MFS Intelenet, 193 F.3d at 1120.* All this means for the purposes of the present appeal is that the Act does not currently mandate a provision requiring combination. Our task is to determine whether such a provision "meets the requirements" of the Act, i.e., to decide whether a provision requiring combination violates the Act. The Supreme Court's interpretation of the Act makes absolutely clear that it does not, and we have already so held. *See MFS Intelenet, 193 F.3d at 1121.* The district court's invalidation of this provision must be reversed as well so that the original provision is restored to the agreement.

Id. at 1268.

The Hobbs Act very clearly does not divest the Illinois Commerce Commission of authority to implement the Illinois Public Utilities Act in reviewing Ameritech's tariffs or in adopting terms of interconnection that are intended to promote competition. Courts have held that the Hobbs Act is a civil procedure provision, it does not preempt state law. *Marshall v Consumers Power Co.*, 65 Mich App 237, 237 NW2d 266 (Mich. 1975.)

CONCLUSION

Ameritech recognizes that the FCC has not ruled against AT&T's line splitting interconnection proposal. *Order* at p. 45, *citing Line Splitting Order*, at ¶ 25. Because AT&T's line splitting proposal does not impede competition in the local exchange market, there is nothing in the FCC's *Line Splitting Order* or the FCC's *Line Sharing Order*, or any of the cases cited by Ameritech, that prevent the Commission from adopting AT&T's proposed line splitting arrangement and imposing that standard in Ameritech's tariffs reviewed under Illinois law.

In fact, regardless of whether the FCC ultimately concludes that it would require AT&T's proposed split line interconnection arrangement, the Illinois Public Utilities Act vest the Illinois Commerce Commission with complete authority to order line splitting, as proposed by AT&T, under Sections 13-505.5, 13-505.6, and 9-201. Moreover, the Illinois Commerce Commission has held on several prior occasions that it can and will, where appropriate to promote competition, order interconnection arrangements beyond those minimum requirements established by the FCC.

Given the complexities of the line splitting issues, the short time period after the issuance of the *Line Splitting Order*, and the March 18th deadline imposed under Illinois law for the approval and modification of Ameritech's tariff, it is understandable for the Commission to have forgotten that this proceeding was a matter brought under the tariff review provisions of Illinois law. However, the Commission must not allow the 2 paragraphs at page 52 of the Commission's *Order* to stand, and must either clarify or reconsider its order.

Because the Commission's conclusions that it would not order Ameritech to provide line splitters to AT&T was based on an erroneous legal foundation, the Commission should further reconsider this conclusion that splitters should not be available. However, Data Net Systems

defers to the application for rehearing submitted by ATT for the factual basis in the record that supports the splitting arrangements requested by AT&T.

Wherefore, for each of the foregoing reasons, Data Net Systems respectfully requests that the Commission, at a minimum, reconsider or revise its *Order* to clarify that the Commission has authority, and that the Commission will in the appropriate circumstance, order incumbent local exchange carriers to provide new combinations of network elements as part of the UNE-platform and as part of any interconnection arrangement. Data Net Systems further requests that the Commission specifically hold that, as a matter of law, the Federal Communications Act does not preempt the authority of the Illinois Commerce Commission to 1) require Ameritech to combine network elements for competitive carriers, 2) require Ameritech to provide new network combinations to competitive carriers, and 3) require Ameritech to provide new combinations of network elements under the UNE-platform to competitive carriers.

Respectfully submitted,

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STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

ILLINOIS BELL TELEPHONE COMPANY	)	**ICC Docket No. 00-0393**
Proposed Implementation of High Frequency Portion of Loop (HFPL))/Line Sharing Service	)	

NOTICE OF FILING

Please take notice that on April 12, 2001, the undersigned filed an original and eleven (11) copies of **Data Net Systems, LLC's Petition For Clarification Or In The Alternative, Rehearing And Reconsideration Of The Commission's March 14, 2001 Order and** (2) copies of **the Motion For Oral Argument** with the Clerk of the Illinois Commerce Commission, via Federal Express.

Henry T. Kelly

CERTIFICATE OF SERVICE

I, Henry T. Kelly, an attorney, on oath state that I served this **Notice of Filing** and a copy of each of **Data Net Systems, LLC's Petition For Clarification Or In The Alternative, Rehearing And Reconsideration Of The Commission's March 14, 2001 Order and Motion For Oral Argument** on the service list attached by depositing the same in the U.S. Post Office Box at 30 N. LaSalle Street, Chicago, Illinois, with first class postage prepaid on April 12, 2001. However, those individuals on the service list with an asterick, will be sent via Federal Express also on April 12, 2001.

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